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In The

Supreme Court of the United States

October Term, 1993

JERRY TARKANIAN, TIM GRGURICH, RONALD GANULIN AND SHELLEY FISCHER,

Petitioners,

vs.

NATIONAL COLLEGIATE ATHLETIC ASSOCIATION,

Respondent.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. WHETHER THE NINTH CIRCUIT PROPERLY DETERMINED THAT THE NEVADA STATUTE VIOLATED THE COMMERCE CLAUSE OF THE UNITED STATES CONSTITUTION?

2. WHETHER THE NINTH CIRCUIT DECISION VIOLATES THE TENTH AMENDMENT AS AN IMPERMISSIBLE EXERCISE OF FEDERAL POWER?

LIST OF PARTIES

Petitioner Jerry Tarkanian

Petitioner Tim Grgurich

Petitioner Ronald Ganulin

Petitioner Shelley Fischer

Respondent National Collegiate Athletic Association

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

This case involves a request by the National Collegiate Athletic Association for a declaratory judgment and injunctive relief following petitioners' demands upon the NCAA to abandon its procedures for conducting investigations and hearings of potential NCAA rules violations, and to adopt, instead, the provisions of Nevada Revised Statutes §§ 398.155-398.255 (the "Statute"). The Statute directly regulates interstate commerce beyond Nevada's borders and has the extraterritorial effect of subjecting the NCAA to inconsistent legislation in other states, thereby destroying the national uniformity on which the NCAA's "product" is marketed. The Statute is therefore violative of the Commerce Clause of the United States Constitution, and petitioners' arguments to the contrary defy this Court's well-established precedent. Accordingly, the National Collegiate Athletic Association respectfully requests that this Petition for Writ of Certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit be denied.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the impact on the Commerce Clause of the United States Constitution, Art. I, § 8, cl. 3, of §§ 398.155 through 398.255 of the Nevada Revised Statutes. The Commerce Clause provides:

> Congress shall have power . . . [t]o regulate commerce . . . among the several states.

STATEMENT OF THE CASE

A. The NCAA.

As found by the Ninth Circuit Court of Appeals, the National Collegiate Athletic Association ("NCAA") is a voluntary, unincorporated association of 1,056 members, including four-year colleges and universities, conferences, associations and other educational institutions. Its members are located in every state of the United States. The NCAA itself conducts seventy-six (76) annual NCAA championship events throughout the United States that involve member teams and individual student-athletes from across the country, all competing under common rules of eligibility and amateurism. Likewise, collegiate recruiting of prospective team members takes place on a national (and even international) scale.

Among the purposes of the NCAA are to initiate, stimulate and improve intercollegiate athletic programs of student-athletes; to encourage its members to adopt eligibility rules to comply with satisfactory standards of scholarship, sportsmanship and amateurism; to formulate and publish rules of play governing intercollegiate athletes; to establish eligibility standards for regional and national athletic events; and to legislate, through bylaws or by resolutions of a convention, upon any subject of general concern to the members related to the administration of intercollegiate athletics. As set forth in the NCAA Constitution, it is a fundamental policy of the Association "to maintain intercollegiate athletics as an integral part of the educational program and the athlete as an integral part of the student body and, by so doing, retain a clear line of demarcation between intercollegiate athletics and

professional sports." (NCAA Const. § 1.3.1). Another fundamental policy is that "member institutions shall be obligated to apply and enforce [NCAA] legislation, and the enforcement program of the Association shall be applied to an institution when it fails to fulfill this obligation." (NCAA Const. § 1.3.2).

UNLV, the institution employing the petitioners, is and has been a member of the NCAA since 1958. Upon requesting to join the Association, it agreed, in writing, to administer its athletic programs in accord with the constitution, bylaws and other legislation adopted by the members of the Association. As the Nevada Legislature stated in its findings, "member institutions must agree contractually to administer their athletic programs in accordance with the rules of the National Collegiate Athletic Association."

The enforcement program, referenced in the above-fundamental policy, is included in the NCAA bylaws. These bylaws, and all legislation of the NCAA, must be adopted by a vote of the active members during the Annual Convention. Just as each member must agree to abide by the substantive rules of the Association relating to eligibility, recruiting, financial aid, admissions and other matters, the members must also agree to submit to the enforcement program, including the procedures.[1] As indicated by Professor Charles Alan Wright of the University of Texas (a former member and chairman of the NCAA Committee on Infractions) in his affidavit to the

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[1] As this Court has stated, "By joining the NCAA, each member agrees to abide by and to enforce [the legislation]." *NCAA v. Tarkanian*, 488 U.S. 179, 183 (1988).

trial court, it would be impossible for the NCAA to enforce substantive rules without nationally uniform procedures.

The NCAA enforcement program is administered by the NCAA Committee on Infractions, composed of six members from the staffs of member institutions or conferences and appointed by the NCAA Council. The Committee establishes the procedure for investigating possible infractions of the rules that govern recruiting, admission, eligibility and financial aid of student-athletes. The member institutions vote to approve these procedures. The Committee considers complaints concerning member institutions, determines facts related to alleged violations, considers whether an institution has taken appropriate corrective actions for admitted violations and imposes corrective action on members found to be in violation of NCAA rules.[2] The corrective actions that the Committee may assess have been adopted by the membership and are contained in the NCAA bylaws.

The 1991-92 NCAA Manual, as well as the opinions of both the District Court and Ninth Circuit outlining the uncontroverted facts, set forth procedures that must be followed in the processing of an infractions case with respect to any member institution located anywhere in the United States.[3] The procedures, sanctioned by the

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[2] The NCAA does not take action against institutional employees or student-athletes, but only against the member institutions. The members are required, however, to apply the agreed-upon rules applicable to employees and student-athletes.

[3] Petitioners characterize NCAA procedures as "procedural due process atrocities." (Petition, p. 3). As recognized

membership, include the initial notification to the institution that a preliminary inquiry is being made. If the enforcement staff determines that a possible rule violation has occurred, it sends an Official Inquiry to the Chief Executive Officer of the institution. The Official Inquiry must include a statement of the NCAA rule alleged to have been violated and the details of each separate allegation. The staff must also provide the institution and other involved individuals with the names of the principals involved and the names, addresses and telephone numbers of any persons contacted during the NCAA investigation. The institution is required to advise all involved individuals, all present or former staff members and any prospective, present or former student-athlete whose eligibility could be affected by the charges, that they have the opportunity to submit any information they desire to the Committee and that they and their personal legal counsel may appear before the Committee. The institution is also required to investigate the charges, interview the principals and other individuals contacted by the staff, indicate whether the allegations are substantially correct and submit written evidence to the Committee to support its responses to the Official Inquiry.[4]

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by the courts below, however, the NCAA procedures outline detailed steps that the membership (including UNLV) has provided.

[4] These cooperative, nonadversarial procedures are a balance between institutional responsibility and independent verification through the NCAA enforcement staff to achieve a program that is effective, fair and compatible with the autonomy of the members.

Prior to the Committee on Infractions hearing, prehearing conferences are held with the NCAA staff, the institution and all affected individuals and their legal counsel. At those meetings, the NCAA staff is required to provide all information upon which it intends to rely at the hearing. All involved parties review all relevant documents and statements. Violations may be agreed upon or withdrawn and areas of factual dispute are identified. Agreements are reached concerning further possible joint interviews to assist in resolving conflicts in information. Before the Committee calls a hearing to resolve controverted matters, the NCAA staff must deliver to all concerned parties a summary statement of the case that identifies the individuals and information upon which the staff will rely in presenting the case.

The Committee on Infractions hearing consists of a detailed presentation of the case by the enforcement staff, followed by the responses from the institution and any affected individuals (and their legal representatives). Questions and information may be exchanged among all parties at the hearing. After the hearing, the Committee members privately make their determinations of fact, determine appropriate corrective action, if any, and prepare their written report. The NCAA bylaws require that the Committee must base its findings on information provided to it that it determines to be credible, persuasive and of a kind on which reasonably prudent persons rely in the conduct of serious affairs. The institution and individuals may appeal the Committee's findings of fact and recommended corrective action to the NCAA Council. Additional evidence and arguments may be submitted in the appeal hearing.

The Committee on Infractions hearings are not criminal hearings.[5] The primary issue before the Committee is whether a member institution has violated the rules enacted by the membership. There is no process whereby the NCAA can force individuals to give depositions or to appear before the Committee for purposes of cross-examination, as the Committee has no power to issue subpoenas.[6]

B. The Nevada Statute.

Prior to the Nevada Statute becoming law, the NCAA and UNLV staffs had been conducting their separate investigations concerning alleged violations of NCAA rules with respect to the UNLV basketball program.[7]

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[5] Petitioners refer to NCAA investigations and hearings as "prosecutions" at which they are the "accused." This terminology is inaccurate and misleading in the context of enforcement proceedings of a private, voluntary association.

[6] Even if a particular jurisdiction gave the private Association authority to subpoena within its boundaries, principals and witnesses in an infractions case are generally located throughout the United States.

[7] Petitioners contend that the Statute was enacted in response to the most recent NCAA investigation and the "show cause" order which occurred subsequent to this Court's decision in *Tarkanian v. National Collegiate Athletic Association, supra.* In the courts below, Petitioners cited no evidence which supported this assertion. In addition, the petitioners mischaracterize the penalty imposed in 1990 when they state that UNLV was placed on "an additional year of probation."

In fact, Bylaw 19.4.2.1(m) provides that if an institution is unable to take the Committee's recommended action, it simply reports that fact to the Committee or shows the Committee what corrective action it has taken. The Committee accepts the institution's action or conducts a further hearing. This is the process

Statements had been obtained; information had been gathered; responses had been made to the Official Inquiry by the individuals and UNLV; and the prehearing conferences and Committee on Infractions hearing dates were scheduled. However, shortly before the prehearing conferences were to be held, petitioners made written demands upon the NCAA to substantially abandon its procedure for conducting the investigation and holding the Committee's hearing and to adopt the various provisions of Nev. Rev. Stat. §§ 398.155-398.255. Among the changes demanded were: a requirement that NCAA turn over documents to petitioners prior to the prehearing conference; each petitioner be allowed to confront all witnesses; an independent entity be selected to adjudicate the facts and assess corrective actions; all proceedings be recorded and transcribed; and all other provisions of the Nevada Statute be followed. In response to these demands, the NCAA was compelled to suspend the conferences, postpone the scheduled hearing, and halt further processing of the UNLV infractions case. The NCAA and UNLV could not comply with the petitioners' demands without violating the NCAA rules applicable to all members throughout the United States.

The Nevada Statute mandates numerous procedures for the enforcement proceedings that differ from those contained in NCAA rules and bylaws. For example,

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followed in 1990 when Tarkanian's litigation against the NCAA was finally terminated by the Nevada courts. UNLV reported it could not comply with the 1977 show cause provision pertaining to Tarkanian's suspension, and, after hearings, the parties arrived at an institutional penalty (to which petitioner Tarkanian agreed) in lieu of the original one.

although required by the Statute, the NCAA does not permit a party to a proceeding to confront all witnesses, to have all written statements signed under oath and notarized, or to have a court review each Committee decision. Further, the Statute requires an "impartial" hearing officer. Only the membership in convention can authorize someone other than the Committee on Infractions to conduct the hearing. To permit an outside person to conduct the hearing would destroy one very integral and effective part of the NCAA enforcement process, a hearing by a committee of one's peers.[8]

The NCAA cannot provide its Nevada members with procedural protection it denies others. Due to its inability to subpoena witnesses or require their cooperation, an infractions proceeding could not practicably be processed in compliance with the Nevada statutory provisions even if the NCAA changed its enforcement procedures to the benefit of Nevada members. As a practical matter, the Nevada Statute would force the NCAA to provide all of its members with the same procedural protection that

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[8] The Statute also provides that a state district court may enjoin the NCAA proceeding that violates the statutory provisions. An aggrieved institution raising a successful challenge under the Statute is entitled to costs, attorney fees and compensatory damages equal to "100 percent of the monetary loss per year or portion of a year which is suffered . . . as a result of a penalty imposed in violation of the [Statute]." Nev. Rev. Stat. § 398.245. The Statute further prohibits an association from impairing the rights and privileges of membership of any institution as a consequence of any rights granted by §§ 398.155 - 398.255. Nev. Rev. Stat. § 398.235(3). Thus, the NCAA cannot avoid complying with the Statute by simply expelling its Nevada members.

have been decreed for Nevada institutions, as there cannot be inconsistent enforcement provisions. Both consistent enforcement procedures and consistent substantive rules are necessary to maintain a level playing field for competition throughout the United States. The NCAA simply cannot maintain a nationwide system of interstate competitions and monitor compliance with agreed-upon regulations if some institutions are granted procedural rights that others are not, any more than it could allow some schools to pay their athletes or exempt them from attending classes.

It is for these reasons that the NCAA filed the instant declaratory judgment action seeking a declaration that the Statute was unconstitutional because it violated the Commerce Clause and the Contract Clause.[9]

C. Proceedings in the lower courts.

In October, 1987 the NCAA Enforcement Staff commenced an investigation of possible rules violations by the University of Nevada, Las Vegas intercollegiate basketball program. On December 27, 1990 the NCAA submitted an Official Inquiry to UNLV asking the institution to investigate and respond to certain information

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[9] The NCAA also alleged violations of the First and Fourteenth Amendments. The district court ruled that such causes of action would not be considered in view of its ruling that the Statute violated both the Commerce and Contract Clauses. See Petitioner's Appendix ("P. App.") at B-25. The Ninth Circuit stated it did not need to address the Contract Clause issue in view of its finding that the Statute violated the Commerce Clause. P. App. at A-9.

received by the NCAA. UNLV and the NCAA enforcement staff continued their separate investigations of the possible rule violations and, on July 19, 1991, the NCAA scheduled prehearing conferences with UNLV, the petitioners and other individuals who were implicated in the possible violations of the NCAA rules. The petitioners responded that they would not follow the NCAA investigation and hearing procedures and demanded that the NCAA follow the procedures mandated by the Statute, adopted April 8, 1991.

Because the Nevada Statute would have outlawed many of the procedures followed by the NCAA and UNLV in their respective investigations, and because the NCAA could not proceed under the investigation and hearing requirements of the Statute, the NCAA ceased its investigation, canceled the proposed hearings, and filed the instant action. The complaint named as defendants Governor Miller and the petitioners (the coaches and employees of UNLV who had demanded that the NCAA and UNLV abandon the NCAA procedures and process the investigation and hearing under procedures mandated by the Statute). The District Court dismissed Governor Miller and, instead, ordered UNLV to appear as a party to the suit.

The District Court held that the Statute violated the Commerce and the Contract Clauses. The court did not rule on the NCAA's remaining claims. On petitioners' appeal, the United States Court of Appeals for the Ninth Circuit affirmed the judgment of the District Court as to the Commerce Clause, but did not reach the issue of the Contract Clause.

Because the NCAA markets interstate intercollegiate athletic competition, the Ninth Circuit found that the NCAA is engaged in interstate commerce. The Court of Appeals held that the Statute, by its own terms, regulates only interstate organizations. The Statute directly regulates interstate commerce because the practical effect of the Statute is to require the NCAA to adopt the Statute's procedural rules of enforcement proceedings throughout the country. Because of this effect, and because other states have, or may adopt, statutes with inconsistent procedural requirements, the Court of Appeals found that the Statute directly regulates interstate commerce and violates the Commerce Clause *per se*.

D. Petitioners' reliance upon "findings" of state court judges is improper, as they are not part of valid and final judgments.

The petitioners claim that the "findings" of two Nevada courts purportedly illustrate that the Statute is a necessary tool to force the NCAA to fairly administer its rules. Aside from the fact that there is no record in this case that the Nevada Legislature considered the decisions cited when enacting its legislation,[10] the "findings" on which petitioners rely lack any probative or precedential value in this action because they are not part of valid and final judgments.

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[10] Petitioner Tarkanian did file copies of the opinions with the District Court. However, he made no showing that the Nevada Legislature considered such in enacting the Nevada Statute at issue.

For example, petitioners quote at length from the Nevada trial court's decision in a case pursued by Tarkanian in 1977.[11] As petitioners are aware, however, the NCAA was not even a party to the first (1977) state court action. Moreover, in *University of Nevada v. Tarkanian*, 95 Nev. 389, 594 P.2d 1159 (1979), the Supreme Court of Nevada reversed the trial court's judgment in favor of Tarkanian and remanded the case.

The petitioners also rely heavily upon the decision of the state court judge who heard the case following remand ("the second suit").[12] In the second suit, the

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[11] In 1977 Jerry Tarkanian sued the University of Nevada for deprivation of the protection of the First and Fourteenth Amendments. After Tarkanian and the University entered into a friendly stipulation of facts, the Nevada trial court entered a permanent injunction only seventeen days after suit was filed. Although the NCAA Infractions Committee had sanctioned UNLV and suggested that corrective action be taken by UNLV as to various coaches, and boosters, Tarkanian brought suit in 1977 to enjoin only the sanction suggested by the NCAA to UNLV that he be disassociated from the UNLV basketball program for two years. In *University of Nevada v. Tarkanian*, 95 Nev. 389, 594 P.2d 1159 (1979), the Supreme Court of Nevada reversed the judgment in favor of Tarkanian and remanded the case to give him an opportunity to join the NCAA as a defendant.

[12] In the second suit, the trial court enjoined both the University of Nevada and the NCAA from causing the temporary suspension of Tarkanian's head coaching duties and awarded Tarkanian his attorney's fees. Only the NCAA appealed and the Supreme Court of Nevada affirmed the judgment against the NCAA. *Tarkanian v. National Collegiate Athletic Association*, 103 Nev. 331, 741 P.2d 1345 (1987). That judgment was reversed by this Court in 1988. *Tarkanian v. National Collegiate Athletic Association*, 488 U.S. 179 (1988).

NCAA appealed the trial court's judgment and the Nevada Supreme Court affirmed. *Tarkanian v. NCAA*, 103 Nev. 331, 741 P.2d 1345 (1987). However, that judgment was ultimately reversed outright by this Court's decision in *Tarkanian v. NCAA*, 488 U.S. 179 (1988).

The findings made in prior litigation are not conclusive evidence in subsequent litigation unless they establish the ultimate facts in issue in the subsequent litigation. That state court judges in 1977 and in 1984 were of the opinion that NCAA staff did not treat Jerry Tarkanian fairly does not establish an ultimate fact in this action. If petitioners are citing these earlier findings as evidence of the alleged need for the Nevada Statute, a better source of the Legislature's motive would be found in those materials actually considered by the Legislature, none of which were presented by petitioners to the courts below.

REASONS FOR DENYING THE WRIT

The Ninth Circuit was correct in holding that the Nevada Statute violates the Commerce Clause of the United States Constitution. Consistent with the decision below, it is clear that the Nevada Statute is a direct regulation of the NCAA's governance of intercollegiate athletics because it destroys the national uniformity of the NCAA's enforcement procedures and, in practical effect, would require the NCAA to adopt the stringent Nevada provisions, or the strictest provisions of similar state statutes, nationwide. The Statute directly regulates the flow of interstate commerce and exceeds the limits of

Nevada legislative authority because it reaches beyond the state's borders and interferes with the marketing of the "product" of amateur athletics across the country. As such, the Nevada Statute cannot stand, regardless of any purported purpose the Statute may have been enacted to achieve, because the Commerce Clause prohibits Nevada from significantly interfering with the NCAA governance of intercollegiate athletics throughout the United States.

The Ninth Circuit properly recognized that the NCAA's ability to accomplish its goals of scholarship, sportsmanship and amateurism uniquely depends on the creation of nationally uniform rules under which 1,056 member teams and conferences can compete on an equal basis. The procedures by which the substantive rules are enforced must also be uniform nationwide to assure evenhanded application of the rules and consistent treatment among members. However, as the Ninth Circuit also correctly noted, the Nevada Statute mandates numerous procedures for an enforcement proceeding (*e.g.* confrontation of witnesses, despite the lack of NCAA subpoena power; the requirement of an outside hearing officer other than one sanctioned by the membership; the disclosure and release of information, despite the members' recognition of the importance of confidentiality; de novo review of a private association's determinations by a court; engrafting of rules of civil procedure relating to privilege, objection and evidentiary standards, etc.) that differ from those contained in the NCAA bylaws.

The inconsistency between the NCAA bylaws and the Nevada Statute is serious, for the NCAA cannot provide its Nevada members with procedural protections that it denies to others. Further, as a practical matter, the

NCAA could *not* comply with some aspects of the Statute, even if the NCAA enforcement procedures were changed in all other respects to comport with the legislative mandate. Nevertheless, if Nevada members alone were somehow allowed, for example, to confront adverse witnesses in enforcement proceedings, it obviously would be more difficult (if not impossible) to sanction them. Nevada institutions thus would have less incentive to comply with the NCAA rules that govern intercollegiate competition; they would know that the NCAA would be reluctant to use its finite resources to enforce rules in the burdensome Nevada venue.

The Nevada Statute would ultimately force the NCAA to provide all of its members with the same procedural protections that have been legislatively decreed for UNLV and UN-Reno, at least insofar as it can practically provide those protections. This result is inevitable since NCAA members would not likely agree to be bound by procedural rules providing greater protection to Nevada members, any more than they would agree to rules exempting Nevada institutions from the proscription on hiring athletes. Or, as in other situations found to be violative of the Commerce Clause, the Nevada Statute would "likely compel all member teams to comply with the laws of the strictest state." *See e.g., Partee v. San Diego Chargers Football Co.*, 34 Cal.3d 378, 385 (1983), *cert. denied*, 466 U.S. 904 (1984).[13]

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[13] In fact, the statute explicitly precludes the NCAA from taking the one step that might eliminate the need to adopt nationwide procedures mimicking those established by the Nevada Legislature. Section 398.235 provides that the NCAA

I. THE NINTH CIRCUIT CORRECTLY DETERMINED THAT THE NEVADA STATUTE IS A PER SE VIOLATION OF THE COMMERCE CLAUSE.

A. The decision of the Court of Appeals is legally correct and consistent with prior decisions of this Court. Substantial precedent from this Court supports the Court of Appeals' decision.

Petitioners assert that the Ninth Circuit erred when it determined that the Statute was a *per se* violation of the Commerce Clause, claiming that the Court was precedentially bound to find that the Statute either discriminated against interstate commerce or favored in-state economic interests over out-of-state interests. Petitioners argue that the Ninth Circuit's ruling was error because, instead, the Court determined that the Statute was constitutionally infirm, as it directly regulated "interstate commerce beyond Nevada's state borders" and had the extraterritorial effect of subjecting the NCAA "to inconsistent legislation arising from the injection of Nevada's regulatory scheme into the jurisdiction of other states." See, P. App. at A-13 and A-14. Direct regulation is not enough, petitioners argue, and for that reason request review by this Court.

Contrary to petitioners' assertions, the Ninth Circuit's decision is based upon, and consistent with, this Court's rulings which address the Commerce Clause. The

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shall not "[i]mpair the rights or privileges of membership of any institution as a consequence of any rights granted" under the Act. Thus, the members of the NCAA may not even expel its Nevada institutions and thereby avoid the procedural mechanisms mandated by the Statute.

Ninth Circuit analysis is premised upon *Healy v. Beer Institute, Inc.*, 491 U.S. 324 (1989), in which this Court reiterated the two-tiered approach for addressing state regulations under the Commerce Clause, to wit:

> When a state statute directly regulates *or* discriminates against interstate commerce, *or* when its effect is to favor in-state economic interests over out-of-state interests, we have generally struck down the statute without further inquiry. When, however, a statute has only indirect effects on interstate commerce and regulates evenhandedly, we have examined whether the State's interest is legitimate and whether the burden on interstate commerce clearly exceeds the local benefits.

Healy, supra, 491 U.S. at 337 n.14 (emphasis added) (quoting *Brown-Forman Distillers Corp. v. New York State Liquor Authority*, 476 U.S. 573 (1986) (citations omitted in original)). *See also*, P. App. at A-9, 10.

It is clear, under this Court's analysis, that a state statute need not directly discriminate against interstate commerce or favor in-state over out-of-state interests in order to be deemed a *per se* violation of the Commerce Clause. Rather, as found by the Ninth Circuit, a law violates the Commerce Clause if it directly regulates interstate commerce. *Shafer v. Farmer's Grain Co.*, 268 U.S. 189, 199 (1925).

In *Edgar v. Mite Corp.*, 457 U.S. 624, 640-42 (1982), this Court confirmed that the Commerce Clause prohibits direct regulation of interstate commerce. "Direct regulation" occurs when a statute directly interferes with or burdens transactions that "take place across state lines"

or wholly outside of the state's borders. *Id.*, 457 U.S. at 641. Extraterritorial regulation "exceeds the inherent limits of the enacting State's authority and is invalid regardless of whether the statute's extraterritorial reach was intended by the legislature." *Id; Baldwin v. G.A.F. Seelig*, 294 U.S. 511, 521 (1935). "The critical inquiry is whether the practical effect of the regulation is to control conduct beyond the boundaries of the state." *Healy, supra*, 491 U.S. at 336.

As the Ninth Circuit properly found, the Nevada Statute extends the reach of Nevada law far beyond the borders of that state, and improperly precludes the NCAA from establishing uniform rules to govern and enforce the interstate collegiate practices associated with admissions, financial aid, eligibility, recruiting and other basic athletics issues. The Statute has the "practical effect" of controlling enforcement proceedings elsewhere simply because the NCAA cannot enforce more lenient standards for its Nevada members than for its other members.[14] The reality is that the NCAA's monitoring and compliance system cannot survive if it cannot be applied uniformly in all states.

In *Healy*, the United State Supreme Court also held that:

> . . . the practical effect of the statute must be evaluated not only by considering the consequences of the statute itself, but also in considering how the challenged statute may interact

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[14] In fact, the Nevada Statute has thwarted the processing of an infractions case in New Mexico because one of the parties was a Nevada resident.

> with the legitimate regulatory schemes of other states and what effect would arise if not one, but many or every, state adopted similar legislation.

Healy, supra, 491 U.S. at 336. The Ninth Circuit was correct in finding that a strong possibility exists that other states will adopt, and have adopted, legislation flatly inconsistent with the Nevada Statute, thereby preventing the NCAA from having the uniform rules and procedures essential to its existence. It defies common sense to suggest, as the legislatures in Nevada and several other states have done or threaten to do, that a private association can enforce its substantive rules if each state can dictate the procedures used to enforce those rules, each designed to protect its coaches, athletes and institutions. Because the NCAA must have uniform procedures, the inevitable result will be to require the NCAA to apply the strictest provisions of all of the statutes in all states. On that basis, the Ninth Circuit correctly determined that the Statute is an impermissible regulation of commerce.

The Nevada Statute directly regulates the NCAA rules that govern competition in intercollegiate athletics. The impermissible interference with interstate commerce results simply from the fact that the Statute "directly controls commerce occurring wholly outside the boundaries" of the state (*Healy*, 491 U.S. 324, 326 (1989)), and will adversely affect the NCAA's ability to conduct its business according to agreed-upon rules applicable *uniformly* to all of its member institutions. That is, by adopting the Nevada legislation to force the NCAA to comply with procedural mandates, the Nevada Legislature has extended Nevada law beyond the borders of the state in a manner that directly regulates the activities in all fifty

states. It has disrupted the uniformity of rules and regulations required to preserve the competitive conditions upon which the integrity and success of the NCAA's program depends. The only solution that would allow a level "playing field" is for the NCAA to attempt to adopt the strictest provisions of all state legislation and attempt to apply those requirements throughout the country. But requiring the NCAA to conform its national practices with the laws of every state is just what the Commerce Clause prohibits. Therefore, the Ninth Circuit correctly determined that the Statute was constitutionally infirm as a direct regulation of interstate commerce.

B. The Ninth Circuit properly analyzed the Statute and determined that it was a *per se* violation of the Commerce Clause.

Petitioners next argue that the Ninth Circuit erred in its Commerce Clause analysis because the State's interests in enacting the legislation "must always be considered." Had those interests been weighed, petitioners opine, the court "might have concluded that . . . the state was properly exercising its police power when it enacted the . . . Statute." Petition, p. 18. Both conclusions drawn by the petitioners are, at best, misleading.

First, this Court has never held that Commerce Clause analysis "must always" include consideration of a state's interests in enacting the Statute. Pursuant to well-established principles, the Ninth Circuit properly deemed the Statute invalid *per se*, without further inquiry. *See Healy, supra,* 491 U.S. at 337 ("When a state statute directly regulates . . . interstate commerce . . . we have

generally struck down the statute without further inquiry . . . "). A *per se* violation was appropriately found by the Ninth Circuit, even in light of this Court's decision in *Chemical Waste Management, Inc. v. Hunt*, 112 S. Ct. 2009, 119 L.Ed.2d 121 (1992),[15] because the Statute directly regulates interstate commerce beyond Nevada's borders and its extra-territorial effect subjects the NCAA to the potential of inconsistent regulation from state to state.

Second, the argument regarding the Ninth Circuit's need to consider Nevada's interests in enacting the legislation is, in reality, nothing more than an academic exercise. That is, the Ninth Circuit specifically found that, even if balancing the state's interest was necessary or appropriate, the "balance struck by the learned trial judge was exactly right."[16] P. App. at A-14. The trial court concluded that:

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[15] *Chemical Waste* did not overrule the line of cases which establish, and reaffirm, *per se* analysis of state regulations under the Commerce Clause, including *Healy, supra*, and *Philadelphia v. New Jersey*, 437 U.S. 617 (1978). While this Court, in *Chemical Waste*, determined that the state must "justify" a facially discriminatory statute in terms of the local benefits flowing from it and the unavailability of nondiscriminatory alternatives, this Court also stated that, where a facially discriminatory statute was analyzed, strict scrutiny of any purported legitimate local purpose was the "minimum" standard to be applied. *Chemical Waste*, 119 L.Ed.2d at 132 (citations omitted). A *per se* violation, without inquiry into the purported local purpose, was therefore not eliminated by this Court's decision in *Chemical Waste*.

[16] The petitioners refer to the Ninth Circuit's decision regarding the balancing performed by the district court as "merely dictum." To the contrary, the Ninth Circuit found that the Nevada Statute violates the Commerce Clause *per se*, and that it need not balance the burden on interstate commerce

> Any narrow interests the State of Nevada may have in imposing the requirements [of the Statute] for the protection of institutions and individuals residing in Nevada is outweighed by the general harm to the uniform enforcement of regulations by the NCAA and its member institutions throughout the country.

P. App. at B-18. The Ninth Circuit's opinion affirmed these particular findings of the District Court. There is no chance, then, that the Ninth Circuit "might have concluded" that the Statute was valid as an appropriate exercise of police power, since the Court of Appeals had already adopted the trial court's finding to the contrary.

C. Petitioners' reliance on *Cloverleaf Creamery, Collins and Erie R.R.* are misplaced.

Petitioners argue that the Ninth Circuit erred when it failed to uphold the validity of the Statute, suggesting that the case at hand is "no different" from other cases in which interstate entities were deemed bound to comply with valid state regulations, despite asserted needs for uniform, internal methods of operation. *See, Minnesota v. Cloverleaf Creamery Co.*, 449 U.S. 456, *reh'g denied*, 450 U.S. 1027 (1981); *Collins v. American Buslines, Inc.*, 350 U.S. 528, *reh'g denied*, 351 U.S. 928 (1956); and *Erie R. R. v. Williams*,

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against the local benefit derived from the Statute. Rather than mere dictum, the Court of Appeals then clearly found that if balancing were necessary and appropriate, the trial court had properly analyzed the state's interests and found them lacking. P. App. at A-14.

233 U.S. 685 (1914). However, these cases are inapposite to the situation at hand for at least two reasons.

First, the cases relied upon by petitioners do not involve situations, as here, where the legislation impacts interstate commerce beyond the legislating state's boundaries. For example, despite a state regulation affecting product packaging, a milk distributor may package his product in cardboard milk cartons as required in state "A" and still sell milk in plastic jugs in state "B." *See, Cloverleaf Creamery, supra,* 449 U.S. at 472. By the same token, an employer can continue doing business as usual across the country, despite statutory requirements in one jurisdiction mandating more frequent payrolls than customarily paid by the employer in other areas of the nation. *Erie R.R., supra,* 233 U.S. at 705. Finally, an interstate employer may be financially burdened in a single state due to worker's compensation insurance requirements, but the requirements have no effect on the business conducted or the internal workings of the company in other states. *Collins, supra,* 350 U.S. at 351.

By contrast, the Ninth Circuit correctly found that "[t]he Statute would force the NCAA to regulate the integrity of its product in every state according to Nevada's procedural rules. . . . [T]he Statute could control the regulation of the integrity of a product in interstate commerce that occurs wholly outside Nevada's borders." P. App. at A-12. The Ninth Circuit properly determined that this sort of extraterritorial effect, not found in *Cloverleaf, Erie,* or *Collins,* is forbidden by the Commerce Clause. Moreover, the Ninth Circuit recognized the constitutional impropriety of the Statute's "potential interaction or conflict with similar statutes in other jurisdictions." P. App.

at A-12. Unlike the situations in the cases cited by petitioners, the Ninth Circuit was correct in determining that "[t]he serious risk of inconsistent obligations wrought by the extraterritorial effect of the Statute demonstrates why it constitutes a *per se* violation of the Commerce Clause." P. App. at A-13.

The cases on which petitioners rely are also distinguishable from the case at hand because none of the cited cases involve the attempted regulation of a product in interstate commerce which is, by its very nature, premised upon the concepts of uniformity and consistency. *See, e.g., Collins, supra,* 350 U.S. at 531 (citing *Southern Pacific Co. v. Arizona,* 325 U.S. 761 (1945), wherein this Court rejected the argument that statutorily mandated worker's compensation requirements devastated the uniform internal workings of an interstate busline company to the same degree as the regulation of train lengths disrupted the railroad industry). On the other hand, the Ninth Circuit in the instant case found that "the authority [Nevada] seeks here goes to the heart of the NCAA and threatens to tear that heart out. Consistency among members must exist if an organization of this type is to thrive, or even exist. Procedural changes at the border of every state would as surely disrupt the NCAA as changes in train length at each state's boarder would disrupt a railroad." P. App. at A-15 (citing *Southern Pacific Co., supra*).

In fact, this Court has long recognized that the situation at hand is distinguishable from the cases cited by the petitioners. For example, this Court cited *Collins v. American Buslines, Inc., supra,* in its decision of *Huron Portland Cement Co. v. City of Detroit,* 362 U.S. 440 (1960), for the proposition that, under certain circumstances, a statute

embodying an exercise of a state's police power may withstand constitutional scrutiny even though the legislation may indirectly affect interstate commerce. *Huron, supra,* 362 U.S. at 443-44. However, the *Huron* court then expressly held that "a state may not impose the burden which materially effects interstate commerce in an area where uniformity is necessary." *Id.* at 444 (citing *Hall v. DeCuir,* 95 U.S. 485 (1877); *Southern Pacific Co. v. Arizona,* 325 U.S. 761 (1945); *Bibb v. Navajo Freight Lines, Inc.,* 359 U.S. 520 (1959)).

II. THE NINTH CIRCUIT DECISION DOES NOT VIOLATE THE TENTH AMENDMENT

Petitioners claim that the Ninth Circuit decision is violative of the Tenth Amendment because the judicial determination is purportedly an unlawful "exercise of federal power under the Commerce Clause." Petition, p. 13. In this regard, petitioners assert that the Ninth Circuit opinion is inconsistent with the dictates of this Court, allegedly set forth in *National League of Cities v. Usery,* 426 U.S. 833 (1976), *EEOC v. Wyoming,* 460 U.S. 226 (1983) and *Hodel v. Virginia Surface Mining & Reclamation Ass'n, Inc.,* 452 U.S. 264 (1981). Petitioners' claim is utterly without merit.

First, the cases on which petitioners rely do not limit the power of a *federal court* to strike as unconstitutional a state statute under the Commerce Clause. Rather, these cases recognize limitations on *Congressional* power in regulating commerce, in light of state sovereignty and the

Tenth Amendment.[17] Petitioners do not assert that the Tenth Amendment was violated due to improper congressional action, but attempt to broaden the theory of *National League of Cities* to restrict the authority of the federal court system. The cases cited, however, do not so hold and have no bearing on the case at hand.

Even if the cases cited by petitioners were applicable herein, which respondent denies, *National League of Cities v. Usery, supra,* was overruled by this Court in *Garcia v. San Antonio Metropolitan Transit Auth.*, 469 U.S. 528, *reh'g denied,* 471 U.S. 1049 (1985). In *Garcia,* this Court recognized that its previously-established test, used to determine appropriate limitations on congressional action and set forth in *Hodel, supra,* was not only unsound in principle and unworkable in practice, but was also a disservice to principles of democratic self-governance. *Garcia, supra,* 469 U.S. at 546-547. This Court held, in *Garcia,* that the factors endorsed by petitioners and *National League of Cities* were obsolete and that, instead, "states must find their protection from *congressional* regulation through the national political process, not through judicially defined spheres of unregulable state activity." *South Carolina v.*

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[17] *See e.g., Hodel, supra,* 452 U.S. at 286-87, wherein this Court held:

> When *Congress* attempts to regulate the States as States the Tenth Amendment requires recognition that 'there are attributes of sovereignty attaching to every state government which may not be impaired by *Congress,* not because *Congress* may lack an affirmative grant of legislative authority to reach the matter, but because the Constitution prohibits it from exercising the authority in that manner.'

Id. (citations omitted) (emphasis added).

Baker, 485 U.S. 505, 512, *reh'g denied*, 486 U.S. 1062 (1988) (citing *Garcia*, *supra*, 469 U.S. at 537-54) (emphasis added).

In sum, petitioners attempt to apply the facts of this case to a standard condemned by this Court which (even when valid) was intended to determine the proper limitation of *congressional* power under the Commerce Clause. The standard advanced by the petitioners is inapplicable to decisions rendered by a federal court and, in any event, has been stricken by this Court as inconsistent with established principles of federalism. Therefore, petitioners' argument is without legal foundation and does not provide a basis for review by this Court.

III. THIS COURT SHOULD DENY THE PETITION

A. The Statute was designed to modify the conduct of a single entity, the NCAA, and was not intended to address a broad social need.

In the Petition for Certiorari, petitioners argue that certiorari should be granted because the case presents important issues that will purportedly affect "untold thousands." The petitioners attempt to portray the Nevada Statute as a broad social remedy providing benefits for many Nevada citizens otherwise deprived. To the contrary, the only people who could be directly affected by an NCAA enforcement proceeding in Nevada are a few Nevada student-athletes, their coaches, and possibly athletic representatives of an institution. As the District Court found, the Statute "was not designed to address a sensitive social problem. Rather, the challenged state law

is narrowly directed at, and intended to modify, the conduct of a single private entity, the NCAA." P. App. at B-9. Since the Ninth Circuit's decision, invalidating Nevada's effort to regulate the NCAA's enforcement procedures, will directly impact only those involved in the proceedings themselves, petitioners' argument for review is exaggerated and fails to establish a basis for this Court to grant the petition.

B. The existence and effect of legislation in other states confirm the propriety of the Ninth Circuit's decision.

Petitioners assert that certiorari is merited because three other states have enacted statutes which dictate that the NCAA must abandon its internal procedures upon which the members have agreed, and mandate that the Association apply different rules and standards in each of those states.[18] Despite petitioners' argument, however, the existence of the Nebraska, Florida and Illinois legislation does not compel review by this Court. To the contrary, the promulgation of legislation in these states confirms that the Ninth Circuit's decision was correct; the NCAA cannot survive if subject to varying, statutorily-imposed mandates in different states. The extraterritorial effect of the Nevada Statute is only highlighted by the fact that other states have followed suit and established

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[18] Petitioners also contend that similar legislation has been introduced in California, Iowa, Kansas, South Carolina and New York. In fact, it appears that proposed legislation, mandating NCAA compliance with state-dictated procedures, is currently pending only in New York.

inconsistent sets of procedures under which the NCAA cannot function. Thus, the presence of other, inconsistent legislation affirms the propriety of the Ninth Circuit decision and is not a valid basis for granting the petition.

CONCLUSION

For the reasons stated herein, the Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit by Petitioners Jerry Tarkanian, Tim Grgurich, Ronald Ganulin and Shelley Fischer should be denied.

Respectfully submitted,

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